IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. C/472/2011,E/1076,1077/2011

(Arising out of Order-in-Appeal No. SB(53-54) 53-54/MV/2011 dated 5.4.2011 passed by Commissioner of Central Excise (Appeals), Mumbai-I)

OSS System (I) Pvt. Ltd. **Appellants**
OSS System (I) Pvt. Ltd.
Rumi Keki Motashaw

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**

Appearance:

Shri Anil Balani, Advocate, with Shri Rohan Balani, Advocate, for appellants
Shri S. Hasija, Superintendent (AR), for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 6.8.2018
Date of Decision: 10.12.2018

ORDER No. **A/88080-88082/2018**

Per: S.K. Mohanty

These appeals are directed against the impugned order dated 5.4.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I.

2. Brief facts of the case are that the appellant M/s. OSS System (I) Pvt. Ltd., was granted with the Letter of Permission by the office of the Director, STPI, Mumbai

for development/manufacture of software under the EOU scheme. For the purpose of development of software and for export to outside India, the appellant had procured capital goods/equipment etc., without payment of duty, under the provisions of Notification Nos.140/91-Cus., dated 22.10.1991 and 1/95-C.E., dated 4.1.1995. The said exemption notifications prescribed certain conditions for availing the duty exemption contained therein. The Central Excise officers visited the premises of the appellant on 14.5.2009 and on inspection/verification of stock of capital goods, they found that the registered premises were occupied by some other company, viz., M/s. XCEL Telecom Pvt. Ltd., and that except three air-conditioners, no other bonded goods procured by the appellant were available in the said premises. Thus, the department contended that the appellant had contravened the provisions of the notifications dated 22.10.1991 and 4.1.1995 and accordingly, the customs and central excise duties on the capital goods should be recovered from the appellant. On the basis of investigation, show cause proceedings were initiated against the appellants seeking for recovery of duty demand and for imposition of penalties. The matter was adjudicated vide order dated 1.11.2010, wherein the imported goods and indigenously procured goods were confiscated, with the option to redeem the same on payment of redemption fine. Besides, the said order also confirmed duty demands under Section 72 of the Customs Act, 1962 and Section 11A of the Central Excise Act, 1944. In addition, penalties were also imposed on both the appellants. On appeal, the learned Commissioner (Appeals), vide the impugned order dated 5.4.2011, has upheld the adjudged demands confirmed on the appellants.

3. The learned Advocate appearing for the appellants submitted that since export obligations in terms of the above referred notifications read with prescribed conditions in the bond have been complied with by the appellants, confirmation of the adjudged demands by the authorities below is not proper and justified. He further submitted that duty demand, if any, should have been confirmed on the depreciated value of capital goods as per the notification dated 22.10.1991.

4. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that the appellant did not produce any document before the authorities below to show that it had achieved the export obligation in terms of the bond executed by it. He further submitted that the appellant is liable to pay

the entire duty liability confirmed against it and the benefit of payment of duty at depreciated value should not be available inasmuch as no such documentary evidences were produced in support of such claim before the authorities below. Thus, he submitted that confirmation of the adjudged demands is in conformity with the statutory provisions.

5. Heard both sides and perused the records.

6. Notification No.140/91-Cus., dated 22.10.1991 exempts specified goods, when imported into India by the software development unit, for the purpose of development of software etc. The central excise duty exemption has also been provided under Notification No.1/95, dated 4.1.1995 for domestically procured capital goods for use in development of software for the purpose of export. The duty exemption provided in the said notifications is subject to certain conditions. The primary objective of the duty exemption provided in the said notification is to develop the software, which are to be exported out of the country. It has further been provided in the said notification that the duty-free goods imported/purchased domestically should not be removed from the unit, without the approval of the jurisdictional Customs authorities. In this case, it is an admitted fact on record that during the course of visit

by the Central Excise officers to the unit of the appellant, the registered premises was in possession of some other entity and not with the appellant. Thus, it is evident that as per the condition of the notification as well as the terms of the bond, the appellants had not fulfilled the conditions of use of capital goods/equipment for development of software, meant for export. Further, we also find that the appellants have not substantiated the fact before the authorities below with any documentary evidence that the export obligations have actually been achieved by them. Upon detailed analysis of the case, the learned Commissioner (Appeals), vide paragraph 15 in the impugned order, has recorded specific finding that the appellants did not achieve the export obligation. Therefore, confirmation of duty/interest demand by the authorities below cannot be faulted with.

7. With regard to the claim of depreciation on removal of capital goods from the factory, we find that the learned Commissioner (Appeals), vide the impugned order dated 5.4.2011, has stated that the appellants had not submitted the calculation of the depreciated value of capital goods at the time of their removal from the factory premises. However, on perusal of the letter dated 16.3.2011, addressed to the Commissioner

(Appeals), we find that the learned Advocate had enclosed the worksheet, showing depreciated value of the capital goods. On perusal of the said letter *vis-à-vis* the observations recorded by the learned Commissioner (Appeals), we find that the submissions of the appellants regarding value of depreciated capital goods have not been considered and the duty demand has been confirmed in entirety. Since the appellants through their Advocate had specifically submitted the worksheet, showing depreciated value of capital goods, which has also been acknowledged by the office of the Commissioner (Appeals), we are of the view that the matter should be remanded to the learned Commissioner (Appeals) for examination of such worksheet and other documents for computation of the duty liability afresh. While adjudicating the matter, the first appellate authority should also examine whether the benefit of Notification No.67/95-Cus. (N.T.), dated 1.11.1995 can be extended to the appellants with regard to payment of interest on the duty amount.

8. In view of the foregoing discussions, the impugned order sustains, so far as it denied the benefit of exemption provided in the notifications dated 22.10.1991 and 04.01.1995. However, for computation of duty liability on depreciated value of capital goods,

the matter is remanded to the original authority for necessary adjudication. While deciding the issue afresh, the original authority should also consider the issues, whether the appellant is entitled for the benefit of notification dated 01.11.1995 (supra) regarding payment of interest and imposition of penalty.

9. The appeals are disposed of in above terms.

(Pronounced in court on 10.12.2018)

(C.J. Mathew)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)

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